Being Gay under India’s Constitution

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Adeel Hussain So 15 Jul 2018 So 15 Jul 2018

Being homosexual in India is like having studied abroad. It gives the speaker a permeant topic of conversation. But consensual gay sex is illegal in India – it has been, ever since the British hastily punched together the Indian Penal Code (IPC) of 1860. Large chunks of the IPC were written during the Indian Rebellion of 1857-58, a rebellion so bloody that Karl Marx in his bi-weekly *New York Daily Tribune* columns, dared to hope that after witnessing British atrocities, even “thoughtful men may perhaps be led to ask whether a people are not justified in attempting to expel the foreign conquerors”. This showed. The colonial government cruelly weaponized the Indian Penal Code to smash any political resistance against the Crown. Sedition charges against Indians dominated much of nineteenth century colonial criminology.

The colonial government also intended to do good. After all, the enlightenment spectres of Bentham and Bacon loomed large in the colonial government’s self-imagination. Therefore, the Indian Penal Code was deftly seasoned with pedagogical measures. These measures were intended to cultivate, to use the infamous words of a key member of the Indian Penal Code commission, “a class of persons Indian in blood and colour, but English in tastes, in opinions, in morals and in intellect”. Section 377 IPC stood out. This norm penalised, and

as of the time of this writing still penalises, “carnal intercourse against the order of nature”. No further instructions are given, as to what concretely violates the order of nature, but the essence of 377 IPC is captured in a concise law school rhyme: “the British civilising mission, criminalised sex, that was not in the missionary position”.

There was a golden opportunity for the Supreme Court to puncture 377 IPC in 2012, when a two-judge penal reviewed a 2009 Delhi High Court’s verdict that had detected irreconcilable tensions between 377 IPC and Article 14 (equality), Article 15 (discrimination), and Article 21 of the Indian Constitution. In regard to Article 21, which protects the right to life and liberty, the Delhi High Court had promoted a well-established reading of an “enlarged scope”.

This enlarged scope of Article 21, the High Court diligently noted, “include[d the] right to protection of one’s dignity, autonomy and privacy”. 377 IPC denied homosexuals their “core identity” – which is living out their desired sexual lives – the High Court penned, and in so doing unfairly hindered them to “attain fulfilment, grow in self-esteem, built relationships of his or her choice”. The Court consequently recommended to “read down” the penal norm. It should no longer include consensual encounters that happens between adults and bedsheets, especially MSM (that’s the technical legal abbreviation for “men who have sex with men”).

Constitutional lawyers warmly embraced the verdict’s wide references to foreign constitutional courts and LGBTQIA+ activists immediately put their newly won freedom to good use by parading up and down Delhi waving rainbow flags. Kind words showered in from other Indian Courts. The former Chief Justice of Himachal celebrated the decision as “a model in learning, humanity, and Indian constitutional principles.” Even the government retreated. The Attorney General declared that he had no intention to appeal the decision. For a moment the world looked bright and it seemed that prudish Victorian morals had ultimately been quashed by a broad-minded *Kamasutra*-ian permissiveness.

Only a small group of neo-conservatives was very unhappy. They quibbled that the Delhi High Court had bested them of their customary right to control their neighbours sex-lives. With 377 IPC being “read down”, their mental stability was at in jeopardy. If they were to, say, walk down a busy city lane – think of an Indian one milled with cars, cows, cycles, rikshaws and gap-year tourists – MSM-parties could be going on behind closed curtains everywhere. They laid out how this constituted a mental injury at some length.

The two Supreme Court justices were not persuaded by such trivial arguments. And yet the Supreme Court overturned the Delhi High Court’s decision. The argument ran as follows: the parliament had amended the IPC roughly thirty times after it was adopted in 1950, with an extensive overhaul of sexual offences in 2013. And despite recommendations to the contrary, the legislature had consciously decided to keep Section 377 IPC. For the justices this meant “that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision.” Such sentences go directly to the nuts and bolts of parliamentary democracy. They stand in contrast to some contemporary scholarly views, where the beam of light illuminating the pathway towards ever greater global ethical coherence ought to shine from watchtower-Supreme Courts.

“The legislature shall be free”, the justices pointed out drily instead, “to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.” Shashi Tharoor, a MP from Thiruvananthapuram and according to his twitter-bio “author of 17 books”, was one of the few politician who took this criticism to heart. He floated a private member bill in parliament, which unfortunately ebbed down quickly.

This week the question has finally been picked up by the Supreme Court again. And like in 2013, the government is not contesting the case. A number of activist petitioners have already testified. They speak of a great “empathy” radiating from the current bench. Justice Chandrachud accelerated liberal hopes further, when he laid out that the review of the 377 case opened up the possibility to protect all relationships under the constitution. Indians should no longer have to suffer from culturally engrained “moral policing”.

With liberal democracies losing steam around the world, the Supreme Court should also clarify what it regards as its role in India’s democracy; particularly in how far social questions can and ought to be resolved by the judiciary in such dire times.

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